UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JEFFREY PROVENZANO, THOMAS BENJAMIN and MONICA AGOSTO, on behalf of themselves and all others similarly situated, Plaintiffs, -against- THE THOMSON CORPORATION and WEST PUBLISHING CORPORATION d/b/a BARBRI, Defendants.	Civil Action No. 1:07-CV-0746, LEK/RFT

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Defendants The Thomson Corporation ("Thomson") and West Publishing Corporation ("West") (collectively "Defendants" or "BAR/BRI"), by their attorneys, Satterlee Stephens Burke & Burke LLP, respectfully submit this memorandum of law in support of their motion, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the complaint in this action for failure to state a claim upon which relief may be granted.

PRELIMINARY STATEMENT

The complaint in this action (as amended June 26, 2007) alleges that defendants, owners and producers of BAR/BRI, the leading bar review preparation course, have misled consumers through their advertising. It is notable, however, that the plaintiffs make not a single claim that the BAR/BRI course itself failed to live up to its billing – indeed, it would appear from the public record that all three plaintiffs took the course and then passed the bar exam on their first try. Rather, plaintiffs' claim is premised on the novel idea that it is deceitful for BAR/BRI to suggest to exam candidates that its product is superior or, apparently, that a bar review course – any course – is useful at all.

Simply put, BAR/BRI has said nothing in its advertising that is untrue or deceptive in any way. In order to claim otherwise, plaintiffs would have this Court believe that, despite three years of rigorous legal training, they and their colleagues are nevertheless incapable of making accurate judgments about BAR/BRI's advertising claims or even, apparently, reading such claims in a fair manner. For example,

- Plaintiffs assert that "the bar exam is not different from law school" and that BAR/BRI is misleading exam candidates by saying otherwise – based on the fact that, inter alia, the multiple choice format of the MBE is sometimes used in law schools as well (Am. Compl. ¶ 28);
- BAR/BRI, plaintiffs urge, is being "false, misleading and deceptive" to suggest that it would be difficult for most students to take all 21 topics tested on the New York bar, because the "factual truth" is that 5 of these are core requirements and students have time to take some electives (id. ¶ 30);

- Plaintiffs claim that BAR/BRI deceptively fails to bring the existence of its competitors to the attention of potential customers (id. ¶ 25) – despite the fact that plaintiffs claim elsewhere that "a simple search reveals other choices for bar candidates" (id. ¶ 34).

Many words come to mind to describe these claims, but among the first is "implausible" – i.e., it is simply implausible that any law student, much less a graduate of a New York law school would read BAR/BRI's advertising in such a preposterous manner or that he or she could be so easily led astray – particularly when the gravamen of plaintiff's claims is not that BAR/BRI made misrepresentations about the course itself, but rather about, in essence, the adequacy of law school training to prepare one for the bar without a review course. And implausible is precisely what a complaint may not be and survive a motion to dismiss under the recently revised standards announced by the Supreme Court (and as interpreted by the Second Circuit). Speculative and far-fetched claims such as plaintiffs' may not be used to support the imposition on defendants of the time and expense of discovery or be used for their in terrorem value to coerce defendants into forking over a ransom in attorneys' fees.

The implausibility of plaintiffs' claims, in fact, must be apparent even to plaintiffs, as they nowhere allege that they themselves were misled by any of BAR/BRI's advertising. Thus, not only do plaintiffs fail to allege any deceptive acts or statements by BAR/BRI that would mislead a reasonable consumer, they also fail to allege that the Defendants' supposedly deceptive acts caused them any harm whatsoever. Both deficiencies are utterly fatal to their claims, and for that reason the complaint should be dismissed in its entirety.

BACKGROUND

Defendant West Publishing Corporation is a Minnesota corporation that owns and produces the "BAR/BRI" program of preparation for the bar examination of most states, including for the New York State bar exam. West is an indirect wholly-owned subsidiary of defendant The Thomson Corporation, an Ontario corporation.

According to the complaint, plaintiffs Jeffrey Provenzano, Thomas Benjamin, and Monica Agosto are three graduates of Albany Law School, each of whom in the year of their graduation (2006, 2005 and 2005, respectively) enrolled in BAR/BRI and sat for the New York bar examination. (Am. Compl. (Declaration of Thomas J. Cahill ("Cahill Decl.") Ex. A) ¶¶ 4-6.) A check of public records indicates that, in fact, all three plaintiffs took, and passed, the exam in July of their graduation year and are now admitted members of the New York bar. (See Cahill Decl. ¶¶ 3-4, Exs. B-C.)

On or about June 18, 2007, plaintiffs, on behalf of themselves and a putative class of New York law school graduates, filed a complaint in the Supreme Court of Albany County. On July 13, 2007, plaintiffs purported to serve Defendants with an Amended Complaint. Defendants removed the action to this Court on July 17 on the basis of diversity of citizenship. By agreement of the parties, Defendants' time to answer the amended complaint was extended to August 17, 2007.

ARGUMENT

The amended complaint purports to state two causes of action: the first for violation of New York's deceptive trade practices statute, N.Y. Gen. Bus. L. ("GBL") § 349; the second for common-law fraud. Plaintiffs' allegations do not make out a claim under either theory. There are numerous deficiencies in the complaint, but foremost is that plaintiffs have failed to demonstrate that BAR/BRI's advertising is false, misleading, or deceptive in any way.

I. PLAINTIFFS HAVE NOT STATED A CLAIM UNDER GBL § 349

A. The Complaint Must State Facts Demonstrating a Plausible Basis for Relief

As the Court is no doubt aware, the Supreme Court recently signaled a significant change in the standards by which a complaint is to be judged on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1964-69 (2007). In Twombly, the Court emphasized that Fed. R. Civ. P. 8(a) requires that "the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief,'" id. at 1966, and that this requirement is imposed "lest a plaintiff with 'a largely groundless claim' be allowed to 'take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value,'" id. (quoting Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347, 125 S. Ct. 1627 (2005)). Rule 8, the Court stated, "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" Id. at 1964-65. In particular, the Court abrogated and deemed "best forgotten" the oft-quoted standard of Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99 (1957), that a "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." See Twombly, 127 S. Ct. at 1968-69.[1]

Reviewing the decision in Twombly, the Second Circuit has held that it signaled an "alteration in the regime of notice pleading that had prevailed in the federal courts ever since [Conley]" and is best understood as "requiring a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." Iqbal v. Hasty, 490 F.3d 143, 155, 157-58

[1] The Court's specific holding was that a complaint alleging a Sherman Act § 1 conspiracy may not simply allege parallel market behavior by competitors, but must allege "enough factual matter (taken as true) to suggest that an agreement was made," i.e., facts that give rise to a "plausible suggestion of conspiracy." Twombly, 127 S. Ct. at 1965, 1971; see also id. at 1974 ("Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.").

(2d Cir. 2007). In another case, the Circuit emphasized that "to survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient to 'raise a right to relief above the speculative level.'" ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., ___ F.3d ___, 2007 WL 1989336, at *5 (2d Cir. 2007) (quoting Twombly, 127 S. Ct. at 1965).[2]

Even prior, however, to the new pleading standards of Twombly, courts in this Circuit addressing complaints alleging violations of GBL § 349 have held that, even though the fraud pleading standards of Rule 9(b) are not applicable to a § 349 claim, a plaintiff nevertheless "must allege with some specificity the allegedly deceptive acts or practices that form the basis for the claim." USAlliance Fed. Credit Union v. Cumis Ins. Soc., Inc., 346 F. Supp. 2d 468, 472 (S.D.N.Y. 2004); see also Pelman v. McDonald's Corp., 237 F. Supp. 2d 512, 526-27 (S.D.N.Y. 2003). Thus, "conclusory allegations . . . are not sufficient to state a claim under Section 349 in the absence of factual allegations in support thereof." USAlliance, 346 F. Supp. 2d at 472. It is clear, therefore, that the complaint must be dismissed unless the plaintiffs have pled specific facts giving rise to an inference beyond mere speculation that there is a plausible basis for relief under § 349. As shall be seen, plaintiffs have failed to meet this standard.

B. Plaintiffs Have Not Pled Any Specific Deceptive Acts by Defendants That Misled Them

GBL § 349 provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." GBL § 349(a). A private right of action is afforded to "any person who has been injured by reason of any violation of this section." Id. § 349(h). To state a cause of action under § 349 requires "a showing that defendant is engaging in an act or practice that is deceptive or

[2] The Second Circuit has rejected the notion that Twombly should be confined to the context in which it arose, i.e., antitrust claims. ATSI, 2007 WL 1989336, at *5 n.2; Iqbal, 490 F.3d at 157.

misleading in a material way and that plaintiff has been injured by reason thereof." Goshen v. Mut. Life Ins. Co. of N.Y., 98 N.Y.2d 314, 324, 774 N.E.2d 1190, 746 N.Y.S.2d 858 (2002).

An objective test applies to deceptiveness, i.e., "a deceptive act or practice is "a representation or omission 'likely to mislead a reasonable consumer acting reasonably under the circumstances.'" Shapiro v. Berkshire Life. Ins. Co., 212 F.3d 121, 126 (2d Cir. 2000) (quoting Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20, 26, 647 N.E.2d 741, 623 N.Y.S.2d 529 (1995)). The objectively misleading nature of a representation must be determined as to each plaintiff in light of his or her circumstances. Solomon v. Bell Atl. Corp., 9 A.D.3d 49, 54, 777 N.Y.S.2d 50 (1st Dep't 2004). Application of this test may be determined by the Court as a matter of law. Oswego, 85 N.Y.2d at 20; see, e.g., Conboy v. AT&T Corp., 241 F.3d 242, 258 (2d Cir. 2001) (affirming 12(b)(6) dismissal of § 349 claim where conduct alleged by plaintiff was not deceptive); S.Q.K.F.C., Inc. v. Bell Atl. Tricon Leasing Corp., 84 F.3d 629, 636-37 (2d Cir. 1996) (same).

Further, not only must the acts of defendant be objectively misleading, the plaintiff must have actually been misled. See Conboy, 241 F.3d at 258 ("a Section 349 violation requires a defendant to mislead the plaintiff in some material way"); Solomon, 9 A.D.3d at 52 (to prevail under § 349, "the plaintiff must prove that the defendant made misrepresentations or omissions that were likely to mislead a reasonable consumer in the plaintiff's circumstances, that the plaintiff was deceived by those misrepresentations or omissions and that as a result the plaintiff suffered injury."); Levine v. Philip Morris Inc., 5 Misc. 3d 1004(A), 798 N.Y.S.2d 710, 2004 WL 2334287, at *7-8 (Sup. Ct. N.Y. Cty. 2004) (plaintiff failed to show that she was actually deceived by alleged misrepresentations).

Right away, it is apparent that the complaint fails to state a claim under § 349 for the simple reason that the named plaintiffs never allege that they were actually misled by any of the supposedly deceptive statements listed in the complaint. Indeed, the complaint never alleges that the named plaintiffs were even exposed to the specific misrepresentations upon which the complaint rests.[3] See Whalen v. Pfizer, Inc., 9 Misc. 3d 1124(A), 2005 WL 2875291, at *2-3 (Sup. Ct. N.Y. Cty. 2005) (§ 349 plaintiff must show that he or she was exposed to alleged misrepresentations and reasonably deceived thereby). It is not sufficient under § 349 to demonstrate the general tenor of advertising directed at the plaintiff, but consideration must be given to the actual representations made to each plaintiff. See Solomon, 9 A.D.3d at 53-54.

In addition to the failure to allege that they were in fact deceived, the complaint is flawed for the more fundamental reason that it is bereft of allegations of any acts or omissions by Defendants that are objectively deceptive. Plaintiffs' claims of deception rest entirely on interpretations of BAR/BRI statements that might charitably be described as strained; less charitably, some of plaintiff's readings are outright preposterous. At the worst, plaintiffs have identified subjective claims of product quality that are no more than mere "puffing" and therefore cannot give rise to liability under GBL § 349. See Pelman, 237 F. Supp. 2d at 528 & n.14; Cytyc Corp. v. Neuromedical Sys., Inc., 12 F. Supp. 2d 296, 300 (S.D.N.Y. 1998).

Defendants examine each of plaintiffs' claims of deception in turn. It is patently implausible that the complained-of representations would be misleading to any consumer of BAR/BRI products, and that is even more plain in light of the fact that each of the plaintiffs is alleged to have enrolled in BAR/BRI the year of their graduation from law school – in other

[3] The alleged misrepresentations in the complaint were apparently taken from the BAR/BRI website some one to two years after plaintiffs successfully took their bar exams, and thus the complaint contains no specific allegation of any advertising that plaintiffs actually would have been exposed to. (See Am. Compl. Ex. A (indicating retrieval from website on "Saturday, June 23, 2007").)

words, by the allegations of the complaint, the earliest each of these plaintiffs purchased the course was in his or her last semester of law school. The circumstances of these named plaintiffs are relevant to the determination of whether BAR/BRI's actions were misleading, see Solomon, 9 A.D.3d at 54, and that is particularly true here, where plaintiffs largely make no allegations that BAR/BRI misrepresented the nature or content of its course but rather claim that BAR/BRI deceived students as to the necessity of a bar review course in light of one's law school experiences – a subject with which, of course, each of the plaintiffs would have been quite familiar and had ample information with which to test BAR/BRI's claims.[4]

1. Extent of Marketing

The complaint states, in rather repetitive detail, the various ways in which bar exam candidates – in general, but not necessarily the named plaintiffs themselves – are exposed to BAR/BRI marketing. (Am. Compl. ¶¶ 11-24.) Despite plaintiffs' efforts to insinuate something untoward about these practices – describing students as being "bombarded" and "barraged" (id. ¶ 11), or that BAR/BRI "exploits" the pressures of law school (id. ¶ 23) – these allegations make out nothing more than a claim of thorough marketing. There is absolutely nothing deceptive about any of these alleged practices – no representation or omission alleged in these paragraphs at all, much less one that would be objectively misleading. Indeed, there is no specific allegation as to the content of this "barrage" of marketing (and, as already discussed, no

[4] Although the named plaintiffs purport to bring this action on behalf of a putative class, no such class has been certified at this point, and it is therefore proper for the Court to consider only the claims of the named plaintiffs on this motion to dismiss. See Zimmerman v. HBO Affiliate Group, 834 F.2d 1163, 1169-70 (3d Cir. 1987) (because claims of representative must be typical of the class, it was proper for district court to first consider, on a motion to dismiss, "whether the named plaintiff, and a fortiori any putative class which the named plaintiff might properly seek to represent" had a cause of action); Selman v. Harvard Med. Sch., 494 F. Supp. 603, 613 n.6 (S.D.N.Y.) (inappropriate to consider claims of absent class members prior to certification in determining motion to dismiss), aff'd, 636 F.2d 1204 (2d Cir. 1980). It should also be noted that the plaintiffs cannot pursue their GBL § 349 claims as a class action because they are seeking the statutory treble damages (Am. Compl. Prayer for Relief ¶ C), which may not be recovered in a class action under CPLR 901(b). See Leider v. Ralfe, 387 F. Supp. 2d 283, 287-93 (S.D.N.Y. 2005).

claim as to what these plaintiffs actually heard); all that is claimed is that the statements made on the BAR/BRI website, discussed infra, are "reflective of the type of statements" made in such marketing.

2. BAR/BRI Website FAQ

The centerpiece of plaintiffs' claim is a paragraph drawn from the "Frequently Asked Questions" ("FAQ") of BAR/BRI's (current) website. That paragraph states,

> **Q. Why do I need a bar review course?**
>
> The bar exam is different from law school. It is nearly impossible to accumulate the necessary materials, prepare a 2-month study plan and discipline yourself to pass the bar exam without a review course. Additionally, most law students could not take all topics tested on their state's bar exam in law school. Even if you studied a bar topic in law school, it is generally taught from a different perspective than how it is tested on the bar exam. Enrolling in BAR/BRI provides the experience and expertise of bar exam professionals.

(Am. Compl. ¶ 27 and Ex. B.) On its face, it is apparent that, while persons could certainly disagree about the extent to which a bar review course is necessary after law school, there is nothing false or misleading about what is said in this paragraph. The paragraph (nor any of the other citations in the complaint) cannot remotely be construed to state, as plaintiffs suggest, that it is "absolutely imperative" to take BAR/BRI or that a candidate "cannot pass" the bar without it. (Id. ¶ 25.) That the BAR/BRI website takes a rather pro-BAR/BRI stand on this issue is surely not surprising, nor surely can it be said that anyone, much less a reasonable third-year law student acting reasonably, would not recognize that BAR/BRI's opinion on the necessity of its product might be in the upper range of reasonable opinions. Defendants stand behind each of the statements as a factual matter, but as a matter of law, this paragraph is clearly a subjective claim about the necessity of taking BAR/BRI that is at most non-actionable puffing.[5] See, e.g., Cytyc, 12 F. Supp. 2d 296, 300-01 (S.D.N.Y. 1998) ("subjective claims of product quality" such as product was "the new gold standard" are nonactionable puffing under GBL § 349); Lacoff v. Buena Vista Publ'g, Inc., 183 Misc. 2d 600, 610, 705 N.Y.S.2d 183 (Sup. Ct. N.Y. Cty. 2000) (book advertised as "recipe for investment success" was nonactionable puffery or opinion); see also Time Warner Cable, Inc. v. DirecTV, Inc., __ F.3d __, 2007 WL 2263932, at *11-12 (2d Cir. Aug. 9, 2007) (defining "puffery" under Lanham Act as "subjective claims about products, which cannot be characterized as true or false" and "a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion").[6]

This conclusion becomes even more inescapable once one examines the specific attacks plaintiffs make on this paragraph. Plaintiffs begin by claiming that, contrary to the first sentence of the FAQ, the "factual truth . . . is that the bar exam is not different from law school." (Am. Compl. ¶ 28 (emphasis in original).) One is tempted to say that the Court may take judicial notice of the fact that the bar exam and law school are not the same thing, but it is unnecessary to go so far. The support plaintiffs offer up for this rather counterintuitive "factual truth" is that (1) the "multistage" [sic, should be "multistate"] portion of the bar exam is multiple choice and some professors at New York law schools also give multiple choice tests; and (2) the New York bar essay portion also contains questions similar to what one might find in a New York law school. (Id.) True, these two assertions cannot seriously be disputed, but plaintiffs' conclusion that this makes the bar exam and law school identical rests on shakier ground.

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[5] As this Court has noted, "Advertising carries with it a certain latitude. Puffery, bragging and a degree of exaggeration are not unexpected and, generally, courts will not interfere with a company's marketing strategy." Garden Way Inc. v. Home Depot Inc., 94 F. Supp. 2d 276, 278 (N.D.N.Y. 2000).

[6] Courts have held that the analysis of claims under GBL § 349 is identical to those under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). See Cytyc, 12 F. Supp. 2d at 300; Merck & Co., Inc. v. Mediplan Health Consulting, Inc., 425 F. Supp. 2d 402, 410 n.6 (S.D.N.Y. 2006).

More to the point of a GBL § 349 claim, however, is that in order for this claim to support a finding of objective deceptiveness, the Court would have to find that the reasonable BAR/BRI customer in general, and in particular a reasonable third-year law student, would understand the FAQ to be stating something to the effect of, "the bar exam methodology is utterly foreign and unlike anything previously known to you in law school." Such a reading of the first sentence would be anything but reasonable. It becomes even more unreasonable when the FAQ is read as a whole, as is required under § 349. See Cytyc, 12 F. Supp. 2d at 300 (sufficiency of claim "is to be judged on the basis of the challenged statements read in their entirety and in context"). The rest of the FAQ makes it clear just how BAR/BRI contends the bar exam differs from law school – namely, in the breadth of topics covered in one exam, the time constraints for preparation, and the difference in perspective from which the courses are taught. Plaintiffs' claims about similar testing methods have nothing to do with these issues and do not begin to demonstrate that the FAQ is misleading.

Continuing their piecemeal attack on the FAQ, plaintiffs then assert that the statement that "it is nearly impossible to accumulate the necessary materials, prepare a 2 month study plan and discipline yourself to pass the bar exam without a review course" is false because, "after completion of the rigorous law school experience," candidates "are fully capable of scheduling studying on their own 8 hours per day, seven days per week." (Am. Compl. ¶ 29.) Again, plaintiffs set up a straw man which bears no relationship to what BAR/BRI actually says in its advertisement. To begin with, plaintiffs' assertion about discipline says nothing to refute the FAQ's claim about the difficulty of "accumulat[ing] the necessary materials" – i.e., comprehensive outlines of the law in all of the areas covered by the bar exam – nor of the difficulty of preparing a 2-month study plan. Moreover, BAR/BRI never says that it is impossible, only "nearly" so, and thus plaintiff's claims do not demonstrate that this statement is untrue. To the extent that "nearly impossible" makes a strong, even exaggerated claim, it is once again of the nature of opinion or puffing.

In addition, given that the plaintiffs had nearly finished law school at the time they purchased BAR/BRI – i.e., by their own claims, had completed "the rigorous law school experience" (Am. Compl. ¶ 29) – then clearly they knew of their own abilities and skills with respect to study habits and discipline (as would any law student). Thus, even if somehow this statement by BAR/BRI were untrue (which it clearly was not), it could not possibly mislead the plaintiffs, as required to state a claim under § 349.[7]

The same deficiencies plague plaintiffs' attack on the statement that "most law students could not take all topics tested on their state's bar exam." Plaintiffs' "factual truth" is, once again, a refutation of something BAR/BRI did not say. The statement in the FAQ does not state, or even suggest, that the topics listed in the "Subject Frequency Chart" (the accuracy of which plaintiffs do not question) are not taught in most law schools. What the FAQ says, and what any reasonable person (much less any reasonable law school graduate) would understand it to mean, is that it is unlikely that any given student would, or could, take all of the topics over the course of a law school career, and nothing plaintiffs assert challenges that statement in the least.[8] Once again, moreover, these plaintiffs were (at the least) in their last semester of law school. They knew what topics they had covered in law school and what they had not, so there is simply no way that this statement could have misled them. Either plaintiffs knew they had in fact taken all (or most) of the topics on the Frequency Chart, in which case BAR/BRI's assertion was immaterial, or they knew they had not, in which case BAR/BRI's statement was true even as to them specifically.

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[7] Alternatively, to the extent the statement in the FAQ should be read to be referring to the abilities of exam candidates in general, such a claim could not possibly have been material to the plaintiffs' decision whether to enroll.

[8] Some of plaintiffs' statements in paragraph 30 – e.g., that certain of the topics to be tested (such as federal jurisdiction) are "core first year law school subjects which are mandated by every A.B.A. approved law school in America" – are almost certainly untrue as a factual matter. Regardless, however, the first-year core

Next, plaintiffs claim that it is misleading to state that topics are "generally taught from a different perspective [in law school] than how [they are] tested on the bar exam" because, plaintiffs claim, the substantive law tested on the exam is the same as it is taught in law school. Plaintiffs again read the statement in an unreasonable manner, contrary to the requirements of GBL § 349. Nowhere does BAR/BRI suggest that the law as tested is different from what students are taught in law school – and no reasonable law student (and certainly not a third-year) could possibly understand that claim to be being made (or, if it were made, to believe it). This statement is read reasonably to refer to the fact that, while the bar exam tends to test knowledge of "black-letter law," law school courses often take a broader view, with discussions of, for example, the history of an area of law and how it developed. Again, a student in the circumstances of the plaintiffs would certainly be in a position to know whether they had received a relatively "black-letter" education in a given topic or a more theoretical one, and thus such a statement could not possibly be misleading to them.[9]

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curriculum for most law students would likely cover only 5 or 6 of the 21 topics listed in the New York bar exam Frequency Chart.

[9] Defendants also note that many schools, including in New York, teach some or all legal topics from a "national" perspective rather than focus specifically on New York (or any other state's) law in particular. As is evident from reading the FAQ in its entirety (Am. Compl. Ex. B) – and as would be evident to any reasonable reader – the FAQ is not directed specifically at New York students but is of a more general nature and could be directed to students at any law school in any state. (The first paragraph, for example, refers generally to "each state's bar exam," what "almost all states" do, and refers the reader to the website for more information on "each jurisdiction's bar exam.") Thus, the statement that courses are "generally" taught from a different perspective than black-letter New York law is undeniably true.

Finally, plaintiffs point to another of the FAQs as allegedly misleading, specifically,

> **Q. Who teaches the BAR/BRI classes?**
>
> BAR/BRI has a national and regional faculty of bar exam specialists. They are experts in teaching for this unique exam and they know how their subjects are tested on the bar. Many of these specialists have been teaching for BAR/BRI for more than 30 years.

(Am. Compl. ¶ 32 and Ex. B.) Plaintiffs also claim as deceptive this description of the faculty:

> In our course, you will see and hear the most dynamic bar review lecturers in the country. Our faculty, some of whom are profiled below, have spent countless hours analyzing past bar exams in order to develop strategies for your success.

(Am. Compl. ¶ 32 and Ex. E.) Here, plaintiffs' claims go from mere strawmen to complete nonsequiturs. Plaintiffs argue that the above statements are false because "Professors teaching at law schools located in the State of New York . . . must know the substantive law tested on the New York State bar examination and must impute that substantive knowledge to their students during class." (Am. Compl. ¶ 32 (emphasis in original).) Even assuming it to be true (despite its facial implausibility) that all law school professors in New York "must" teach all topics with an eye to the New York bar exam, that has nothing to do with BAR/BRI's claims above. Read reasonably, and not with an eye towards concocting a lawsuit, the above statements are merely BAR/BRI's touting of its faculty – not a comparison of BAR/BRI faculty versus New York law school professors and certainly not the disparagement of those professors' teaching skills that plaintiffs appear to be inferring.[10] It would be shocking, frankly, if a business such as BAR/BRI did not trumpet the achievements and skills of its faculty. Plaintiffs' allegations do not

[10] In fact, as the Court can see from Exhibit E, there are at least 3 New York law school professors listed on the BAR/BRI faculty.

contradict a single fact in the above statements, and indeed do not remotely suggest any plausible way in which those statements are misleading or deceptive.

3. Message from Richard Convisor

Plaintiffs continue their search for a deceptive statement by alleging that a message on the BAR/BRI website from BAR/BRI's founder, Richard Convisor, is misleading. (Am. Compl. ¶ 33-34 and Ex. F.) As with certain allegations already discussed, the statement complained of – that BAR/BRI has the "most complete" programs and will give you the "best chance" of passing – is plainly the sort of subjective claim about the superiority of one's product that constitutes non-actionable opinion or puffing. See, e.g., Bose Corp. v. Linear Design Labs, Inc., 467 F.2d 304, 310-11 (2d Cir. 1972) (claims that speakers were "most life-like" or "most exacting" and "overwhelming superiority" were non-actionable puffery); Gordon & Breach Science Publishers S.A. v. Am. Inst. of Physics, 905 F. Supp. 169, 182 (S.D.N.Y. 1995) (claims to be "most cost-effective" were puffery); Nikkal Indus., Ltd. v. Salton, Inc., 735 F. Supp. 1227, 1234 n.3 (S.D.N.Y. 1990) (claim to be "better" than competitors was puffing) Plaintiffs, moreover, by focusing only one paragraph of the message, again make the mistake of pulling portions of the representation out of context, contrary to what is required in determining whether a representation is misleading. See Cytyc, 12 F. Supp. 2d at 300. For example, plaintiffs state that other bar review courses "offer comprehensive, concise outlines," but it is evident from reading the entire Convisor message, specifically the paragraph prior to the one plaintiffs lift out, that the reference to "outlines" is to outlines that BAR/BRI provides not in its actual bar review course but during law school as part of the BAR/BRI Law School Program; plaintiffs do not allege that BAR/BRI's competitors provide such outlines. Further, plaintiffs' allegations, even if true, do not directly contradict BAR/BRI's statements – for example, while BAR/BRI's statement asserts it has "dynamic law school professors," plaintiffs counter (in what must be a deliberate choice of words) that other courses have "dynamic instructors." In short, plaintiffs allegations do not demonstrate that anything said in this statement by Richard Convisor is untrue.

4. Alleged Omissions

Plaintiffs also point to two alleged omissions from BAR/BRI advertising – (1) the supposed fact that the New York bar exam is administered so that "a guaranteed number of persons attempting the State bar examination will fail" and that "no BAR/BRI product can alter this fact"; and (2) the fact that there are other bar review courses available. (Am. Compl. ¶ 25.) The notion that a business has a duty to direct consumers to its competitors is certainly a novel one, and would represent a sea change in the law of advertising, but fortunately it is not the law. GBL § 349 "does not require business to ascertain consumers' individual needs and guarantee that each consumer has all relevant information specific to its situation." Oswego, 85 N.Y.2d at 26; see also Gershon v. Hertz Corp., 215 A.D.2d 202, 202, 626 N.Y.S.2d 80 (1st Dep't 1995) (not deceptive under § 349 for company to fail to disclose to customer the availability of lower-priced alternatives). Accordingly, omissions may only be the basis of a claim under GBL § 349 where "the business alone possesses material information that is relevant to the consumer and fails to provide this information" and a plaintiff's omission-based claim turns in part on whether the plaintiff "possessed or could reasonably have obtained the relevant information." Id. at 26-27; see also Pelman v. McDonald's Corp., 237 F. Supp. 2d 512, 529 (S.D.N.Y. 2003) (dismissing § 349 claim for allegedly deceptive failure to provide nutritional information where no allegation that consumer could not reasonably obtain such information); Super Glue Corp. v. Avis Rent A Car Sys., Inc., 159 A.D.2d 68, 71, 557 N.Y.S.2d 959 (2d Dep't 1990) (company was not required by § 349 to inform its customers that they might already possess insurance that covers car rentals). Moreover, "an omission becomes a misrepresentation only in a situation in which it renders other statements made by a defendant misleading." Henry v. Rehab Plus Inc., 404 F. Supp. 2d 435, 445 (E.D.N.Y. 2005).

Even assuming plaintiffs' claim about the "guaranteed" fail rate on the New York bar is true, such information would be a matter of public record and hardly information possessed by BAR/BRI alone, and (if true) certainly obtainable, especially by third-year law students. Moreover, the BAR/BRI website, from which all of plaintiffs' alleged misrepresentations are taken, also includes links to the website for the New York State Board of Law Examiners, where the grading process is discussed in detail. (Cahill Decl. ¶ 5 and Ex. D.) Further, the alleged omission is simply not material to BAR/BRI's advertising – that is, even if there were a "guaranteed" fail rate, that would not change the incentive for any individual exam candidate to get the best score possible, which BAR/BRI contends, and makes the case for through its advertising, can be done with its product. BAR/BRI never guarantees that the test-taker won't fail (and plaintiff has not pointed to any representations suggesting otherwise). Similarly, the existence of other bar review courses is plainly not a deep secret known only to BAR/BRI; even assuming that these three plaintiffs had managed to make it through three years of law school without having encountered advertising or word of mouth for BAR/BRI competitors, their existence, as plaintiffs allege, is revealed by "a simple search." (Am. Compl. ¶ 34.) Nor does plaintiff point to any evidence that BAR/BRI advertises itself as the only bar review course available.

5. Other Allegations

Finally, plaintiffs allege two other acts that it claims are deceptive and thus subject Defendants to liability under § 349: (1) the fact that BAR/BRI offers in one course its multistate and New York-specific topics; and (2) BAR/BRI's advertising of supplemental courses to candidates who took BAR/BRI but failed the bar exam. (Am. Compl. ¶ 35.) Neither of these will support a claim under § 349. The allegations about product "tying" do not allege anything deceptive about BAR/BRI's marketing; plaintiffs do not allege that BAR/BRI hides the comprehensive nature of its course in any way, nor do plaintiffs allege that BAR/BRI ever communicates the idea that no other products are available. The allegation made, even if it were true, is at most a claim of anticompetitive conduct, but such claims, absent deceptiveness, do not state a claim under GBL § 349. See WorldHomeCenter.Com, Inc. v. L.D. Kichler Co., No. 05-CV-3297, 2007 WL 963206, at *6 (E.D.N.Y. Mar. 28, 2007); Leider v. Ralfe, 387 F. Supp. 2d 283, 294-97 (S.D.N.Y. 2005).

As for the marketing to candidates who failed the bar exam, the named plaintiffs cannot make a claim along these lines, because they do not allege that they failed the exam (and, as noted, it appears from the public record that they passed). Therefore, they cannot possibly claim that they were misled by the alleged representations, even if they were misleading. Moreover, these allegations, assuming them to be true, are not misleading in a material way even to those who did fail the exam. Of course, plaintiffs do not actually include any marketing materials so that one can see the exact representations alleged, but even taking the paraphrasing by plaintiffs as accurate, the supposed falsity – that a test-taker's weaknesses "should have been confronted and resolved" in the main BAR/BRI course – is information that, if true, would already be known to the intended audience (who have, by plaintiff's allegations, already taken the main BAR/BRI course). In other words, a reasonable person who took BAR/BRI and then failed would be in a position to judge for him or herself whether they were satisfied by the initial course, and could not possibly be misled by this advertising.

In sum, therefore, plaintiffs have not alleged a single instance in which it is alleged that BAR/BRI made a misrepresentation or that it is plausible that persons in their circumstances – i.e., students in their final semester of law school or graduates – would be misled in any material way by BAR/BRI's representations or alleged omissions. Nor do these allegations make out a plausible claim for deceptiveness when taken as a whole. It is simply not believable that reasonable students in plaintiffs' position, with the access to information that such persons would have, would understand that BAR/BRI was representing that, as plaintiffs would have it, "a person graduating from a New York law school must purchase a BAR/BRI bar review course in order to have any chance of passing the New York State bar examination" (Am. Compl. ¶ 25) or that if BAR/BRI made such a representation, that it would be seen as anything other than subjective opinion or puffing. Indeed, the proof of this fact is that plaintiffs were not willing to allege that they themselves were actually misled by anything BAR/BRI has said. Because the plaintiffs have not alleged a plausible case that anything BAR/BRI said was objectively misleading or that the named plaintiffs themselves were misled, their claim under GBL § 349 must be dismissed.

C. Plaintiffs Have Not Alleged That Any BAR/BRI Representations Caused Them Injury

Plaintiffs' complaint fails to state a claim under GBL § 349 for an additional reason, and that is because they have not alleged how any acts by BAR/BRI, even if they were deceptive (which, as seen, plaintiffs have failed to allege), caused them any actual injury. To make a claim under GBL § 349, plaintiffs must allege such causation. See Gale v. Int'l Bus. Machs. Corp., 9 A.D.3d 446, 447, 781 N.Y.S.2d 45 (2d Dep't 2004) ("[T]he plaintiff must show that the defendant's material deceptive act caused the injury."); Petitt v. Celebrity Cruises, Inc., 153 F. Supp. 2d 240, 266 (S.D.N.Y. 2001) ("The causation element is essential."). Here, however, plaintiffs do nothing more than make the conclusory allegation that "as a result of the Defendants' violations . . . the plaintiffs . . . have each uniformly suffered actual damages . . . ."

(Am. Compl. ¶ 42.) If such a conclusory statement ever sufficed, it can no longer be deemed adequate under the plausibility standard of Twombly. Plaintiffs have not alleged facts from which a plausible case of causation can be inferred, primarily because plaintiffs nowhere allege that (1) they were actually exposed to any of the supposed BAR/BRI misrepresentations; (2) they were actually misled by them; and (3) most importantly, that absent those misrepresentations they would not have enrolled in BAR/BRI at the supposedly inflated price. Absent these allegations, there is nothing to connect the alleged misrepresentations to the injury alleged, i.e., the alleged "overcharge." See Gale, 9 A.D.3d at 447 ('If the plaintiff did not see any of these [allegedly deceptive] statements, they could not have been the cause of his injury, there being no connection between the deceptive act and the plaintiff's injury."); In re Currency Conversion Fee Antitrust Litig., 230 F.R.D. 303, 311 (S.D.N.Y. 2004) (to prove causation, § 349 plaintiff would have to show that defendant's inadequate disclosure led plaintiff to use defendant's product instead of alternatives). Thus, plaintiffs' claims under GBL § 349 also fail for failure to allege causation.

II. PLAINTIFFS HAVE NOT STATED A CLAIM FOR FRAUD

The inadequacy of plaintiffs' complaint on their GBL § 349 claim is patent. Given the higher hurdle a plaintiff must meet with regards to common-law fraud, it is even more apparent that such a claim has not been adequately pled. To state a cause of action for fraud under New York law, "a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury." Lerner v. Fleet Bank, N.A., 459 F.3d 273, 291 (2d Cir. 2006).

Moreover, allegations of fraud must meet the heightened pleading standards of Fed. R. Civ. P. 9(b). Id. at 290. "In order to comply with Rule 9(b), the complaint must (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." Id. Further, "plaintiffs must allege facts that give rise to a strong inference of fraudulent intent . . . either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." Id. at 290-91. It is clear that plaintiffs' complaint does not satisfy these requirements.

To begin with, as demonstrated above plaintiffs have not even shown that any statements made by BAR/BRI were misleading; it follows a fortiori that plaintiffs have nowhere alleged that such statements are actually false. (Thus, for example, nothing in the complaint remotely suggests that it is actually false to say that "the bar exam is different from law school.") Moreover, to the extent that the complaint alleges statements such as BAR/BRI has the "most complete" programs to "give you the best chance of passing your bar exam," such statements are opinion or puffing that is just as non-actionable for fraud as it is under GBL § 349. See EED Holdings v. Palmer Johnson Acquisition Corp., 387 F. Supp. 2d 265, 276 (S.D.N.Y. 2004) (statement that defendant would build "the greatest boats" was puffery not actionable as fraud).

The statements relied on by plaintiffs, moreover, are not alleged to be the actual statements made to the plaintiffs – they are only alleged to be "reflective of the type of statements" made by BAR/BRI and its representatives. (Am. Compl. ¶ 26.) Thus, the complaint fails to meet the most basic standards of Rule 9(b) – i.e., it never identifies the actual statements made to the plaintiffs, who made them, and where and when they were made. Lerner, 459 F.3d at 290. Fraud cannot be premised on a general description of the statements made – in the fraud context, the actual phrasing and word usage is critical. See, e.g., Abercrombie v. Andrew

College, 438 F. Supp. 2d 243, 272-73 (S.D.N.Y. 2006) (allegation of general content of statement by defendants did not satisfy Rule 9(b)).

Nor do plaintiffs even allege justifiable reliance – indeed, they do not allege that they relied at all on any statements made by BAR/BRI when deciding to enroll in the course. Nor, as discussed above, could any reliance by the plaintiffs – who were in their last semester of law school and therefore had knowledge of how courses are taught in law school and what topics they had taken – have been justifiable. Without reliance, moreover (as discussed with respect to GBL § 349), there can be no plausible showing that the alleged misrepresentations (even if there were any) caused injury to the plaintiffs. And finally, plaintiffs allege no facts, as they are required to do under Rule 9(b), that give rise to a "strong inference of fraudulent intent." Plaintiffs, in short, have not made sufficient allegations with respect to any of the required elements of a fraud claim. Accordingly, that claim too must be dismissed.

CONCLUSION

For the foregoing reasons, the complaint in this action fails to state a claim upon which relief may be granted and should for that reason be dismissed in its entirety.

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